

ANIMAL WELFARE ACT
DEPARTMENTAL DECISIONS

In re: BILL E. DeLOZIER, AN INDIVIDUAL; BILL MURCHISON, AN INDIVIDUAL; BETTY MURCHISON, AN INDIVIDUAL; J.F. MURCHISON, AN INDIVIDUAL; W.M. MURCHISON, AN INDIVIDUAL; AND THREE BEARS GIFT SHOP, a/k/a THREE BEARS GIFTS, a/k/a CHRISTMAS SHOPPE, AN UNINCORPORATED ASSOCIATION.

AWA Docket No. 98-0036.

Decision and Order filed November 7, 2000.

Cease and desist order - Civil penalty - Exhibitor status - Jurisdiction - Violations of AWA - Preponderance of the evidence.

The Administrative Law Judge assessed a civil penalty of \$4,000 and issued a cease and desist penalty against Respondents for violating the Animal Welfare Act and the Regulations and Standards by not providing adequate shelter, clean enclosures, clean water containers, clean food receptacles, adequate water drainage, and proper housekeeping for exhibited Himalayan bears. Persons named on the license application were all presumed to be exhibitors within the meaning of the AWA. Complainant did not prove by a preponderance of the evidence alleged space violations and alleged failure to provide potable water. The Secretary has jurisdiction under the AWA over persons exhibiting animals to the public for compensation without a showing that the persons are engaged in interstate commerce.

Colleen Carroll, for Complainant.

Respondent, Bill E. DeLozier, *Pro se*.

Decision and Order issued by James W. Hunt, Administrative Law Judge.

This disciplinary proceeding brought under the Animal Welfare Act, as amended (7 U.S.C. § 2131 *et seq.*) ("Act"), and the Regulations (9 C.F.R. § 1.1 *et seq.*), was instituted by a complaint filed on August 27, 1998, and an amended complaint filed on March 1, 1999, by the Administrator Animal Plant Health and Inspection Service ("APHIS"), United States Department of Agriculture ("USDA" or "Department").

The complaint and amended complaint (both hereafter referred to jointly as "complaint") alleges that Respondents wilfully violated the Act, Regulations (9 C.F.R. § 2.100(a)) and Standards (Part 3 of the Regulations, 9 C.F.R. § 3.1 *et seq.*). Respondents filed answers and a hearing was held before Administrative Law Judge Edwin Bernstein in Knoxville, Tennessee, on January 19, 2000. Complainant was represented by Colleen A. Carroll, Esq. Respondent Bill E. DeLozier represented himself, *Pro se*, and the other Respondents. Jill R. Talley, Esq., who had entered an appearance for Respondent J.F. Murchison, did not appear at the hearing. Judge Bernstein thereafter retired before issuing a decision. The parties

were then asked to show cause why the case should not be assigned to another administrative law judge for a decision. When the parties did not file objections or show cause why the matter should not be reassigned, the case was reassigned to the undersigned for a decision. The record and briefs have been considered in making the following decision.

Statement of the Case

The complaint, paragraph 1, states that Respondent Bill E. DeLozier is an individual whose mailing address is P.O. Box 1348, Pigeon Forge, Tennessee 37863; that he is a principal or proprietor of Respondent Three Bears Gift Shop, a/k/a Three Bears Gifts and a/k/a Christmas Shoppe, a partnership, association or sole proprietorship, located at 2855 and 2861 Parkway, Pigeon Forge, Tennessee 37838; and that at all times relevant to this proceeding he was licensed by APHIS as an exhibitor as defined in the Act. Respondents did not respond to this allegation in their answers. It is therefore deemed, pursuant to the Rules of Practice, to be an admission of fact. (7 C.F.R. § 1.136.)

The complaint, paragraph 2, further alleges, and Respondents do not deny, that Respondents Bill Murchison, Betty Murchison, J.F. Murchison, and W.M. Murchison are individuals whose mailing address is 3051 Buckhorn Way, Sevierville, Tennessee 37876.

The record shows that Respondent DeLozier exhibits Himalayan bears at Three Bears Gift Shop which sells bread and apples to the public to feed to the bears. (Tr. 25, 56).

The facility was inspected by APHIS Veterinary Medical Officer John Michael Guedron on January 15, August 25, and October 20, 1997, and on August 28, 1998. He found instances of non-compliance with the Regulations and Standards which led to the complaint and hearing in this proceeding. The hearing and briefs also raised a jurisdictional issue and the exhibitor status of Respondents Bill Murchison, Betty Murchison, J.F. Murchison, and W.M. Murchison.

Jurisdiction

Complainant asserts that it has jurisdiction over Respondents' operation on the ground that the animals involved were purchased in commerce. Section 2132(c) of the Act (7 U.S.C. § 2132(c)) defines commerce as "trade, traffic, transportation, or other commerce -- (1) between a place in a State and any place outside of such State, or between points within the same State but through any place outside thereof, or within any territory, possession, or the District of Columbia; (2) which affects trade, traffic, transportation, or other commerce described in paragraph (1)."

The record shows that the bears involved in this proceeding were acquired in 1988 in what appears to have been a transaction that occurred entirely in the state of Tennessee. (CX 1) There is no showing that the bears were ever moved interstate, or for that matter, whether any of Respondents' activities affect interstate commerce. However, the Department has held that it has jurisdiction over all persons engaged in the activities of an "exhibitor" as defined by the Act without regard to whether their activities affect interstate commerce. *Ronnie Faircloth and JR's Auto & Parts, Inc.*, 52 Agric. Dec. 171 (1993).

The Act defines "exhibitor" broadly as any person exhibiting animals for compensation whether for profit or not, excluding pet shops, state and county fairs, livestock shows, purebred dog and cat shows, rodeos, and fairs and exhibitions to advance agriculture (7 U.S.C. § 2132(h)). The record shows that Respondent DeLozier charges for exhibiting the bears to the public and that Respondent Three Bears Gift Shop sells food to the public to feed the bears (Tr. 56, 75). As Respondents DeLozier and Three Bears Gift Shop receive compensation from the exhibition of the bears and the sale of bear food they are therefore exhibitors within the meaning of the Act. The Department accordingly has jurisdiction in this proceeding.

Exhibitor Status of the Murchisons

Respondents Bill Murchison, Betty Murchison, J.F. Murchison, and W.M. Murchison contend that they are not exhibitors. They argue that Respondents Bill E. DeLozier and Three Bears Gift Shop manage and control the facility exhibiting the bears and that they lack control over the care and treatment of the bears. DeLozier testified that he leases the bears from Bill Murchison and pays him \$4,000 a year. (Tr. 164). Respondent J.F. Murchison states in his brief that he had no knowledge about the operation of the facility, that he tried to have his name removed from a lease, and that he derived no economic benefit from the exhibition of the bears.

The record shows that during the times relevant to this proceeding, Respondent Bill Murchison had applied for, and received, an APHIS class "B" dealer's license under the business name of Respondent Three Bears Gift Shop and listed Respondents Betty Murchison, J. F. Murchison, and W.M. Murchison on the application as "owners, partners, and officers." (CX 6).

This license application, containing the Murchisons' names and stating that they were doing business as Respondent Three Bears Gift Shop, which is a compensated exhibitor through the sale to the public of food to feed the bears, raises the presumption that they were exhibitors. They presented arguments but no evidence

to rebut this presumption. I therefore find that Bill E. DeLozier, Three Bears Gift Shop, Bill Murchison, Betty Murchison, J. F. Murchison, and W. M. Murchison were exhibitors as defined in the Act.

Alleged Violations

Space and shelter requirements. The complaint alleges, and Dr. Guedron found at inspections he conducted of Respondents' facility on January 15, August 25, and October 20, 1997, and August 28, 1998, that the bear enclosures failed to provide adequate shelter from sunlight and inclement weather as required by Section 3.127(a) and (b) of the Standards for the care of animals and failed to provide sufficient space as required by Section 3.128.

Section 3.127(a) and (b) of the Standards provides:

(a) *Shelter from sunlight.* When sunlight is likely to cause overheating or discomfort of the animals, sufficient shade by natural or artificial means shall be provided to allow all animals kept outdoors to protect themselves from direct sunlight.

(b) *Shelter from inclement weather.* Natural or artificial shelter appropriate to the local climatic conditions for the species concerned shall be provided for all animals kept outdoors to afford them protection and to prevent discomfort to such animals. Individual animals shall be acclimated before they are exposed to the extremes of the individual climate.

9 C.F.R. § 3.127(a) and (b).

Section 3.128 provides:

Enclosures shall be constructed and maintained so as to provide sufficient space to allow each animal to make normal postural and social adjustments with adequate freedom of movement. Inadequate space may be indicated by evidence of malnutrition, poor condition, debility, stress, or abnormal behavior patterns.

9 C.F.R. § 3.128.

Dr. Guedron testified that at the inspection on January 15, 1997, there were six bears. He said one enclosure contained two female bears, that another had three bears and that each enclosure had only one 5 feet by 16 feet den which he said was too small for the number of bears in each enclosure. The third enclosure contained

one male bear. (Tr. 28, 97). The two female bears in the one enclosure were described as “inseparable” twins, while the other enclosure with three bears included a female bear and her cub. (Tr. 97, 144). Dr. Guedron testified that he estimated the length of the adult bears to be “from five to six feet” (Tr. 118), but did not indicate their width or how much den space each bear required in order to make normal postural adjustments. He testified as follows:

Q. Would a five- to six-foot bear be able to turn around comfortably and make postural adjustments in a den that is five feet in width?

A. (Guedron). “Assuming that he’s crossways in the den, it would be tight, but he would be able to turn around if he was only five -- he or she were only five feet in length.

Q. Anything more than five feet?

A. Would have to make accommodations in turning around rather than just normally and comfortably being able to turn around.

Q. And would even a five-foot bear have to make an adjustment to turnaround in five feet?

A. I don’t know that I can answer that.

(Tr. 127).

....

Q. Would two bears be able to make postural adjustments comfortably and easily in a five-foot by 16-foot den, such as is located to the right of cage A on RX 8, as a shelter?

A. As a sheltered area? There were three bears that were to use that den.

Q. Okay. Let’s use three.

A. No, that’s why I cited it.

(Tr. 128).

....

Q. Would there be room for two -- for two bears?

A. I think you would probably have to see the two bears in there to be able to answer definitively. I would say at a maximum, two bears, as a sheltered area.

(Tr. 131).

Dr. Guedron testified that access to a den was needed to provide the bears with shelter from inclement weather and to "have a method of escape from another aggressive or incompatible animal." (Tr. 38). He did not indicate that any of the bears suffered from malnutrition, poor condition, debility, or were otherwise mistreated. However, at the inspection on August 25, 1997, he observed "[Two bears] fussing or fighting with each other in the larger enclosure. And then I noted four of the bears showing a stereotypical behavior in that they were pacing constantly and continuously in the same pattern back and forth in the enclosure.

Q. What does this indicate; or what did that indicate to you?

A. It generally indicates a type of neurotic behavior that you often see in captive animals, possibly out of boredom.

(Tr. 53).

Dr. Guedron found that the singly housed bear was in an open-top enclosure and did not have access to a den at the inspection on January 25, 1997; that three bears were denied access to a den during exhibition hours at the inspections on August 25, and October 29, 1997, and at the inspection on August 28, 1998.

Complainant has the burden of proving by a preponderance of the evidence the violations alleged in the complaint. The Standards, cited above, do not specifically require that bears have dens and do not set forth the space requirements for dens or enclosures.¹ Dr. Guedron was offered as Complainant's expert witness to provide this essential information. However, while the record shows that he is a doctor of veterinary medicine, it does not show that he had any specific training in or knowledge of the behavior or needs of wild animals, specifically Himalayan bears.

¹The Standards provide minimum space requirements for some animals. See, e.g., 9 C.F.R. § 3.80.

He concluded that Respondents' bears lacked adequate space but he provided few facts on which his conclusion is based and said he made his determination on "visual observation" rather than on measurements. (Tr. 43). He indicated that some bears were demonstrating neurotic behavior but then attributed it, not to inadequate space, but to the boredom of captivity. He further seemed to express some uncertainty about whether the adult bears were five or six feet in length. Still, his opinions are entitled to some deference. It is probably common knowledge that bears use dens in the wild and that they should therefore have them in some form in captivity for shelter from the elements. Thus, I find that Respondents were required to provide shelter for the bears in the form of dens. As for the size of the dens, Dr. Guedron seemed to testify that, in his opinion, Respondents' 5 feet by 16 feet dens were big enough for two adult bears but not big enough for three. Assuming that his opinion is accurate, the den for the two bears would therefore be adequate. As for the den with three bears, one of the bears was only a cub which would require less space than a full grown bear. Dr. Guedron implied, however, in expressing the opinion that the den was not adequate to accommodate three bears, that he was contemplating adult bears that were five or six feet in length rather than a small cub. In these circumstances I find that Complainant has failed to show by a preponderance of the evidence that the enclosure containing two bears and a cub was insufficient to provide them with the space required by the Standards.

However, the failure to provide adequate shelter for the singly housed bear, which DeLozier admitted (Tr. 83), and the failure to allow the bears access to their dens during exhibition hours are violations of the requirements in Section 3.127(a) and (b) of the Standards to provide them with adequate shelter from sunlight and inclement weather.

Failure to clean enclosures. At his inspection on January 15, 1997, Dr. Guedron found that an accumulation of feces in the drainage troughs at the back of the enclosures was not in compliance with the cleaning requirements of Section 3.131(a). (CX 11) This Section provides:

Excreta shall be removed from primary enclosures as often as necessary to prevent contamination of the animals contained therein and to minimize disease hazards and to reduce odors. When enclosures are cleaned by hosing or flushing, adequate measures shall be taken to protect the animals confined in such enclosures from being directly sprayed with the stream of water or wetting involuntarily.

In his answer DeLozier appears to admit this allegation but states that it was corrected. Under Department policy, a condition found by an inspector not to be in compliance with the Standards is a violation even though promptly corrected. *Big Bear Farm, Inc.*, 55 Agric. Dec. 107, 142 (1996). Respondents' failure to clean the enclosure was a violation of Section 3.131(a).

Failure to provide adequate water drainage. The water and feces in the drainage trough on January 15, 1997, is also cited by Complainant as not in compliance with Section 3.127(c) of the Standards because the water in the trough was frozen. (CX 11; Tr. 26) Guedron also observed standing water in an enclosure at his inspection on October 20, 1997. Section 3.127(c) states:

A suitable method shall be provided to rapidly eliminate excess water. The method of drainage shall comply with applicable Federal, State and local laws and regulations relating to pollution control or the protection of the environment.

9 C.F.R. § 3.127(c).

DeLozier said that the problem with frozen water solved itself when it thawed and Guedron testified that there were no bears in the enclosure when he observed the standing water. (Tr. 58). Still, the Standards literally require that water drain away "rapidly." Frozen water indicates that the water had not drained rapidly and, although standing water in an enclosure that had no bears appears to be a *de minimis* violation, it is nonetheless a failure to comply with the standards.

Failure to provide potable water. At the inspection on January 15, 1997 (CX 11), Guedron found that the water receptacles had a dirty film which constituted a failure keep them clean in violation of Section 3.130 of the Standards. However, the complaint, paragraph 6, alleges a failure to provide the bears with access to potable water. Section 3.130 provides

If potable water is not accessible to the animals at all times, it must be provided as often as necessary for the health and comfort of the animal. Frequency of watering shall consider age, species, condition, size, and type of the animal. All water receptacles shall be kept clean and sanitary.

9 C.F.R. § 3.130.

In his answer DeLozier appears to admit that there was a film on the water but with the demurrer that the film was due to the weather. As for access to potable water, he suggested at the hearing that ponds at the facility also served as a water

receptacle. (Tr. 116). Guedron testified that the ponds were not considered water receptacles because the bears could sit in the water and that the water was not potable because it was only circulated. (Tr. 125-27). He did not find that the ponds were in fact unclean or unsanitary. Respondents provided testimony that the water in the ponds was potable: the ponds were frequently cleaned, drained and filled with "city water" and the bears could drink from the ponds as well as from other water receptacles. (Tr. 145). Thus, the bears did have access to potable water. However, Section 3.130 also provides that "all" water receptacles must be kept clean and sanitary. Therefore to the extent that Guedron found some of the receptacles were unclean there was a violation of Section 1.130 of the Standards even though this was not specifically alleged in the complaint.

Lack of veterinary care. Guedron's August 25, 1997, inspection report states that a "program of veterinary care was not available for inspection" (CX 25) and his August 28, 1998, report states that "the new Attending Vet has not filled out a new Program of Vet Care," (Tr. 27) as required by Section 2.40(b) of the Regulations which states that

(b) Each dealer or exhibitor shall establish and maintain programs of adequate veterinary care that include:

- (1) The availability of appropriate facilities, personnel, equipment, and services to comply with the provisions of this subchapter;
- (2) The use of appropriate methods to prevent, control, diagnose, and treat diseases and injuries, and the availability of emergency, weekend, and holiday care;
- (3) Daily observation of all animals to assess their health and well being; *Provided, however,* That daily observation of animals may be accomplished by someone other than the attending veterinarian: and *Provided, further,* That a mechanism of direct and frequent communication is required so that timely and accurate information on problems of animal health, behavior, and well-being is conveyed to the attending veterinarian;

9 C.F.R. § 2.40(b).

In his answer DeLozier stated that the facility had a program of veterinary care and that it was available from the attending veterinarian. Guedron, agreeing in his testimony that Respondents had an attending veterinarian, testified that he had cited Respondents for not having the veterinary program available for inspection at the facility, "not," he said, "that there was not one." (Tr. 50, 64-65).

The Standards, while requiring exhibitors to have a program of veterinary care, do not require that one be kept at the facility. DeLozier also attached to his answer to the complaint a copy of his program of veterinary care which is on an APHIS form 7002. It states that the form may be used by licensees as a guideline to prepare a program. It states that the veterinarian and licensee "should" retain a copy for their files, but like the Regulations it does not specifically require that the licensee/exhibitor keep a copy on the premises. The program could have been available to Guedron for inspection by contacting the attending veterinarian or having DeLozier obtain one from the veterinarian. Thus, the evidence is insufficient to establish that Respondents did not have a program of veterinary care as required by the Regulations.

Accumulated trash. At his inspection on October 20, 1997, Guedron found that garbage and trash had accumulated in an enclosure construction area and that a garbage can without a lid was attracting flies. He said this was a failure to comply with Section 3.131(c) of the Standards. (CX 26; Tr. 56). This section states:

(c) *Housekeeping.* Premises (buildings and grounds) shall be kept clean and in good repair in order to protect the animals from injury and to facilitate the prescribed husbandry practices set forth in this subpart. Accumulations of trash shall be placed in designated areas and cleared as necessary to protect the health of the animals.

DeLozier admitted the violation in his answer but said that the problem had been corrected. As discussed before, a violation occurs even though later corrected. Respondents therefore violated Section 3.131(c) of the Standards.

Failure to properly store food supplies. At inspections on October 20, 1997, and August 28, 1998, Guedron observed that food was not stored in compliance with Section 3.125(c) of the Standards. This standard provides:

Supplies of food and bedding shall be stored in facilities which adequately protect such supplies against deterioration, molding, or contamination by vermin. Refrigeration shall be provided for supplies of perishable food.

9 C.F.R. § 3.125(c).

Guedron said he saw a bag of dry food on the floor in proximity to a pesticide bottle, fire extinguishers, and paint, and observed fly-infested bread and sliced apples which were intended to be sold to customers to feed to the bears. (CX 26, 27; Tr. 56). In his answer DeLozier admitted these facts but said the matter had

been corrected. This failure to properly store food constitutes a violation of Section 3.125(c).

Failure to keep food receptacles clean. Guedron found on October 20, 1997, that the receptacles that contained the apples that were fed to the bears were reused and had dried food on them which showed that they were not properly cleaned as required by Section 3.129. (CX 28; Tr. 70). Section 3.129 states that:

(a) The food shall be wholesome, palatable, and free from contamination and of sufficient quantity and nutritive value to maintain all animals in good health. The diet shall be prepared with consideration for the age, species, condition, size, and type of the animal. Animals shall be fed at least once a day except as dictated by hibernation, veterinary treatment, normal fasts, or other professionally accepted practices.

(b) Food, and food receptacles, if used, shall be sufficient in quantity and located so as to be accessible to all animals in the enclosure and shall be placed so as to minimize contamination. Food receptacles shall be kept clean and sanitary at all times. If self-feeders are used, adequate measures shall be taken to prevent molding, contamination, and deterioration or caking of food.

9 C.F.R. § 3.129 (a) and (b).

DeLozier neither admitted nor denied this allegation in his answer. He stated that the receptacles were styrofoam. As he failed to deny the allegation it is deemed admitted. The failure to clean food receptacles is a violation of Section 3.129(b) regardless of the material from which they are made.

Sanction

Complainant seeks a \$10,000 penalty and a thirty-day suspension. It is based in part on Respondents alleged failure to comply with a prior consent order. (CX 8) However, an examination of that order reveals that Respondents apparently complied with many provisions in the order (since the same incidents were not alleged in this proceeding), while other alleged violations in the order were found in this proceeding not to have been violations, such as the alleged failure to have a program of veterinary care and the alleged failure to provide adequate space for the bears. The record in this proceeding shows that at times the bears were denied access to their dens but does not otherwise show that the animals were treated inhumanely. Considering all the circumstances and that there were some instances

of repeated violations, I find that a penalty of \$4,000 is appropriate.

Findings of Fact

1. Respondent Bill E. DeLozier, an individual whose mailing address is P.O. Box 1348, Pigeon Forge, Tennessee 37863, is a principal or proprietor of Respondent Three Bears Gift Shop, a/k/a Three Bears Gifts and a/k/a Christmas Shoppe, a partnership, association or sole proprietorship, located at 2855 and 2861 Parkway, Pigeon Forge, Tennessee 37838. At all times relevant, Respondent DeLozier was licensed as an exhibitor, as that term is defined in the Act and the Regulations, under the name "Bill E. DeLozier d/b/a Three Bears Gift Shop."

2. Respondents Bill Murchison, Betty Murchison, J.F. Murchison, and W.M. Murchison are individuals whose mailing address is 3051 Buckhorn Way, Sevierville, Tennessee 37876. At all times relevant, said Respondents were licensed as dealers, as that term is defined in the Act and the Regulations, under the name "Bill Murchison d/b/a Three Bears Gift Shop," and were exhibitors, as that term is defined in the Act. Respondent Bill Murchison owns six Himalayan bears which he leased to Respondent Bill E. DeLozier.

3. APHIS conducted inspections of the Three Bears Gift Shop premises and records on January 15, August 25, and October 20, 1997, and on August 28, 1998.

4. On January 15, 1997, Respondents failed to clean enclosures for bears as required.

5. On January 15, 1997, Respondents failed to keep all potable water receptacles clean and sanitary.

6. On October 20, 1997, and August 28, 1998, Respondents failed to adequately store and protect supplies of food.

7. On October 20, 1997, Respondents failed to maintain food receptacles in a clean and sanitary condition.

8. On January 15 and October 20, 1997, Respondents failed to provide a suitable method of drainage to eliminate excess water.

9. On January 15, August 25 and October 20, 1997, Respondents failed to provide animals with adequate shelter from sunlight and inclement weather.

Conclusions of Law

1. On January 15, 1997, Respondents wilfully violated section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)), by failing to clean enclosures for bears as required, in violation of section 3.131(a) of the Standards (9 C.F.R. § 3.131(a)).

2. On January 15, 1997, Respondents wilfully violated section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)), by failing to provide potable water to animals in

clean and sanitary water receptacles, in violation of section 3.130 of the Standards (9 C.F.R. § 3.130).

3. On October 20, 1997, Respondents wilfully violated section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)), by failing to keep their premises clean, in good repair and free of accumulations of trash and to facilitate prescribed husbandry practices, in violation of section 3.131(c) of the Standards (9 C.F.R. § 3.131(c)).

4. On October 20, 1997, and August 28, 1998, Respondents wilfully violated section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)), by failing to adequately store supplies of food, to protect them from contamination by vermin in violation of section 3.125(c) of the Standards (9 C.F.R. § 3.125(c)).

5. On October 20, 1997, Respondents wilfully violated section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)), by failing to maintain food receptacles in clean and sanitary condition, in violation of section 3.129 of the Standards (9 C.F.R. § 3.129).

6. On January 15 and October 20, 1997, Respondents wilfully violated section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)), by failing to provide a suitable method of drainage to eliminate excess water, in violation of section 3.127(c) of the Standards (9 C.F.R. § 3.127(c)).

7. On January 15, August 25 and October 20, 1997, and August 28, 1998, Respondents wilfully violated section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)), by failing to provide animals with adequate shelter from sunlight and inclement weather, in violation of section 3.127(a) and (b) of the Standards (9 C.F.R. §§ 3.127(a) and (b)).

Order

1. Respondents are assessed a civil penalty of \$4,000, to be paid within 120 days of service of this order to the Treasurer of the United States, and forwarded to Colleen A. Carroll, United States Department of Agriculture, Office of the General Counsel, Room 2343, South Building, Washington, DC 20250-1400.

2. Respondents, their agents and employees, successors and assigns, directly or indirectly through any corporate or other device, shall cease and desist from violating the Act and the regulations and standards thereunder, and in particular, shall cease and desist from:

(a) Failing to maintain water and food receptacles in clean and sanitary condition;

(b) Failing to clean enclosures for bears as required.

(c) Failing to keep their premises clean, in good repair and free of accumulations of trash, in order to facilitate prescribed husbandry practices;

(d) Failing to adequately store supplies of food, to protect them from contamination by vermin;

(e) Failing to provide animals with adequate shelter from sunlight and inclement weather.

This decision will become final and effective without further proceedings 35 days after the date of service upon Respondents, unless appealed to the Judicial Officer by a party to the proceeding within 30 days after service, as provided in Section 1.145 of the Rules of Practice. (7 C.F.R. § 1.145.)

[This Decision and Order became final on December 18, 2000, as to Bill Murchison, Betty Murchison, and J.F. Murchison; on January 12, 2001, as to W.M. Murchison; and on January 18, 2001, as to Bill E. DeLozier.--Editor]

In re: GEORGE RUSSELL.

AWA Docket No. 99-0023.

Decision and Order filed January 23, 2001.

Failure to maintain a written program of veterinary care - Failure to make facility available for unannounced inspections - Failure to maintain the physical facility in compliance - Failure to designate a responsible person to accompany APHIS inspectors in his absence - Cease and desist order - Civil penalty - License disqualification.

Administrative Law Judge Dorothea A. Baker imposed a civil penalty of \$2,000.00, issued a cease and desist order, and disqualified Respondent from becoming licensed for a period of one year and continuing thereafter until he demonstrates to the Animal and Plant Health Inspection Service that he is in full compliance with the Act, the regulations and standards issued thereunder. Judge Baker found that Respondent willfully violated the Animal Welfare Act, and the regulations and standards issued pursuant thereto, by: failing to store supplies of food to protect against contamination; failing to provide sufficient potable water; failing to maintain facilities in good repair; failing to keep primary enclosures clean; failing to maintain records as required; and failing to establish and maintain adequate programs and veterinary care under supervision and assistance of a doctor of veterinary medicine. Judge Baker did not impose the Complainant's recommended penalty but instead reduced the monetary penalty because although lacking a written veterinarian program, the evidence shows that there was an established program of veterinary care, and Respondent maintained employment away from his house and he tried to work it out so the inspector would call him at work and meet him at his house. So there was an effort of good faith by Respondent as to the unannounced inspection visits.

Robert A. Ertman, for Complainant.

R. David Ray, West Plains, Missouri, for Respondent.

Decision and Order issued by Dorothea A. Baker, Administrative Law Judge.

Preliminary Statement

This is an administrative disciplinary proceeding under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131 *et seq.*) ("Act"), instituted by a Complaint filed by the Administrator of the Animal and Plant Health Inspection Service ("APHIS"), United States Department of Agriculture ("USDA"), on May 7, 1999. The Complaint alleges that the Respondent willfully violated the Act and the regulations and standards issued under the Act (9 C.F.R. §§ 1.1 *et seq.*). An administrative hearing was held in West Plains, Missouri, on May 17, 2000, before Administrative Law Judge Dorothea A. Baker. Complainant was represented by Robert A. Ertman, Esquire, Office of the General Counsel, United States Department of Agriculture. Respondent was represented by R. David Ray, Esquire, West Plains, Missouri. In due course, the parties filed briefs.

Discussion

Respondent resists the contention that he has violated the Act and regulations by asserting that no willful violations occurred; that upon being advised of non-conforming conditions, Respondent repaired and remedied them but the inspector did not return to determine if Respondent had in fact complied. Respondent further maintains that the Complaint is deficient in not alleging that what Respondent was accused of was failure to maintain a written program of veterinary care. In its Reply Brief, Complainant moved to amend the Complaint to conform to the evidence, citing cases decided by the Judicial Officer where such amendments were allowed. Therefore, the motion to amend is granted.

Respondent argues that since the evidence shows, through his testimony, that he corrected each deficiency, such corrections demonstrate that the violations were not willful. He contends that if the inspectors had returned they would have become aware of the corrective measures.

At the oral hearing the Government requested that the record be left open for Respondent to provide proof that he had maintained a program of veterinary care. Subsequently the Respondent obtained and filed an Affidavit of J. W. Brewer, DVM, which states in part:

....

3. George Russell has maintained programs of disease control and prevention, euthanasia, and veterinary care for many years under the direct